JAN 16 2001

FILED
JAN 16 2001

No. 99-2035

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

FREDERICK M. BARON
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of
Trial Lawyers of America

JEFFREY ROBERT WHITE*
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
* *Counsel of Record*
Attorney for Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE*..... 1

SUMMARY OF THE ARGUMENT..... 2

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT ENTITLE DEFENDANTS TO APPELLATE MODIFICATION OF JURY VERDICTS TO ASSURE THAT PUNITIVE DAMAGE AWARDS ARE PREDICTABLE AND CONSISTENT.. 4

A. Substantive Due Process Does Not Entitle a Defendant to a Predictable Amount of Punitive Damages. 5

B. Jury Consideration of Relevant Factors Would Satisfy Due Process Concerns. 11

II. THE SEVENTH AMENDMENT BARS APPELLATE RE-EXAMINATION OF PUNITIVE DAMAGE JURY VERDICTS. 14

III. DE NOVO APPELLATE REVIEW TO MAKE PUNITIVE DAMAGE PREDICTABLE IN AMOUNT UNDERMINES THE STATE'S INTEREST IN DETERRING TORTIOUS MISCONDUCT.. 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Abney v. United States, 431 U.S. 651 (1977) 12
American Society of Mechanical Engineers, 456 U.S. 556 (1982).....23
Barry v. Edmunds, 116 U.S. 550 (1886).....7
Beardmore v. Carrington, 19 How. St. Tr. 1405, 95 Eng. Rep. 790 (C.P. 1764) 8, 17
BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)...4
Boyd v. United States, 116 U.S. 616 (1886). 18
Browning Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).....21
Cheevers v. Clark, 449 S.E.2d 528 (Ga. App. 1994).....15
Colgrove v. Battin, 413 U.S. 149, 152 n.6 (1973). 20
Coryell v. Colbaugh, 1 N.J.L. 77 (1791) 20
Day v. Woodworth, 13 How. 363, 14 L.Ed. 181 (1852).....7
Defender Indus., Inc. v. Northwestern Mut. Life Ins., 938 F.2d 502 (4th Cir. 1991) 20
Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765).....17
Fabrigas v. Mostyn, 2 Black.W. 929, 96 Eng. Rep. 549 (C.P. 1773).....8
Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).....20
Fischer v. Johns-Manville Corp., 103 N.J. 643, 512 A.2d 466 (1986).....22
Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).....19
Genay v. Norris, 1 S.C.L. 6, 7 (1784).....20
Hetzel v. Prince William County, 523 U.S. 208 (1998).....16
Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994).....6, 7
Huckle v. Money, 2 Wils. 205, 95 Eng. Rep. 768 (C.P. 1763)7, 17
IBEW v. Foust, 442 U.S. 42 (1979) 13
Jackson v. Virginia, 443 U.S. 307 (1979).....5, 9
Kennon v. Gilmer, 131 U.S. 22 (1889) 16

Leith v. Pope, 2 Black. W. 1327, 96 Eng. Rep. 777 (C. P. 1779) 8
Leonen v. Johns-Manville Corp., 717 F. Supp. 272 (D.N.J. 1989) 22
Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 13
McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984)20
Missouri Pacific R. Co. v. Humes, 115 U.S. 512 (1885) 7
Money v. Leach, 19 How. St. Tr. 1001, 97 Eng. Rep. 1075 (C.P. 1764) 17
Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 15 L.Ed. 372 (1856) 7
O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987) 20
Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 4
Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) 22
Parklane Hoisery Co. v. Shore, 439 U.S. 322 (1979).... 13, 19
Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830) 19
Pennsylvania v. Finley, 481 U.S. 551 (1987) 12
Sharpe v. Brice, 2 Black. W. 942, 96 Eng. Rep. 557 (C. P. 1774) 8
Tull v. United States, 481 U.S. 412 (1987) 20
Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) 15
Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) 22
TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 4, 10
Wilkes v. Halifax, 19 How. St. Tr. 1406 (C.P. 1769)..... 9
Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763) . 7, 17

STATUTES

U.S. Const., amend. vii..... passim

Ore. Rev. Stat. § 30.925(3)(g) (1991) 14

OTHER AUTHORITIES

Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 6
Eric Schnapper, *Unreasonable Searches And Seizures Of Papers*, 71 Va. L. Rev. 869 (1985).....17
Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991) 18, 23
Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998).....6

IN THE
Supreme Court of the United States

No. 99-2035

COOPER INDUSTRIES, INC.,
Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For Ninth Circuit

AMICUS CURIAE BRIEF OF
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of *amicus curiae* briefs have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including actions seeking damages for wrongful death and personal injury, vindication of civil rights protected under federal and state statutes, and in other actions seeking legal redress.

ATLA's mission includes the preservation of the right to trial by jury for all Americans as guaranteed by the Seventh Amendment. Petitioner in this case seeks an unprecedented expansion of federal appellate re-examination of jury verdicts. Because de novo review of punitive damage awards by the courts of appeals represents a radical infringement of this constitutional safeguard, ATLA respectfully submits this brief as *amicus curiae* in support of the Respondent.

SUMMARY OF THE ARGUMENT

1. Petitioner urges this Court to recognize a new substantive due process right to limit punitive damages to a predictable level of reasonableness. Traditional and historical practice, the touchstone of the Due Process Clause does not support such a novel right.

The traditional procedure for assessing punitive damages has historically been characterized by the broad discretion vested in the jury in determining the appropriate amount of punitive damages.

This Court has recognized that the jury's discretion is not unbounded. Common law courts have historically reserved the authority to set aside verdicts that are so excessively high in view of the record evidence that they amount to a

---

a monetary contribution to the preparation or submission of this brief.

deprivation of property without due process. None of the precedents found in the common law in 1791 or of this Court support the notion that predictability of punitive damages or consistency among comparable cases is an essential element of fundamental fairness.

Nor is there any support for Petitioner's argument that the factors identified by this Court in the *BMW* case can only be applied by federal appellate courts. Indeed, there is no constitutional right to appellate review at all. Acknowledging that those factors -- the degree of reprehensibility of the misconduct, the ratio of punitive to compensatory damages, and other applicable civil and criminal penalties -- are relevant to a fair and reasonable assessment of punitive damages, they are appropriate for consideration by the jury. Indeed, appellate review of punitive damage awards using factors or evidence that was not presented to the jury violates the Seventh Amendment.

2. Substitution of the federal appellate court's estimation of an appropriate amount of punitive damages for the verdict of the jury clearly violates the Seventh Amendment.

Petitioner's argument that jury verdicts assessing punitive damages are not within the protection of the Seventh Amendment is erroneous. Indeed, the historical development of the jury's authority to assess punitive damages gave impetus to the adoption of the Seventh Amendment itself.

This Court has never held that punitive damages are not a "fact" found by the jury. Indeed, the Court has recently held that where the Seventh Amendment guarantees a jury trial on liability, it also guarantees a jury determination of the amount of damages.

3. De novo review of punitive damage awards other than for irrational excessiveness necessarily requires the federal appellate court to apply a standard of reasonableness that reflects its own values. Those values threaten to undermine or contravene the state interests in providing punitive damages.

Review for the purpose of making punitive damages predictable, for example, undermines the policy of many states which recognizes that it is the unpredictability of such damages which makes them an effective deterrent to wrongdoing. Any standard of reasonableness represents an policy judgment that is reserved to the states, not to the federal appellate judiciary.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT ENTITLE DEFENDANTS TO APPELLATE MODIFICATION OF JURY VERDICTS TO ASSURE THAT PUNITIVE DAMAGE AWARDS ARE PREDICTABLE AND CONSISTENT.

Petitioner and supporting amici urge this Court to establish a new substantive due process right: A constitutional right to predictability in the amount of punitive damages imposed under state law.

This Court has held that defendants have a substantive due process right to set aside punitive damage awards that are excessively high, under the circumstances of the case. The Court added, however, that due process does not guarantee that punitive damage awards be consistent or predictable in amount. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.") The Court reaffirmed this principle in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582-83 (1996) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993).

Petitioner nevertheless urges this Court to assign such a task to the courts of appeals. Through de novo review of punitive awards, Petitioner anticipates that federal appellate

courts will construct a bright line, tile by tile, like a mosaic. Pet. Brief at 18.[2]

To reach its objective, Petitioner recognizes that it must establish two radical propositions of constitutional law. First, that the Due Process Clause of the Fifth Amendment requires that the amount of punitive damages assessed in similar cases be reasonably consistent and predictable. *See* Pet. Brief at 10 & 11.

Secondly, Petitioner must establish that its proposed method for imposing this predictability in awards, de novo appellate re-examination of jury verdicts by federal appellate courts, is consistent with the Seventh Amendment. *Id.* at 28-29.

ATLA submits that Petitioner's argument fails on both counts. Predictability in the amounts of punitive damage awards is neither desirable nor required by the Due Process Clause. In addition, de novo review by appellate courts, substituting their judgment of the appropriate level of punitive damages for that of juries, violates the Seventh Amendment.

A. Substantive Due Process Does Not Entitle a Defendant to a Predictable Amount of Punitive Damages.

This Court has indicated that the standard of review of punitive damages for gross excessiveness is roughly equivalent to the "rational juror" standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), which would ask whether any rational trier of fact juror could have arrived at the jury's punitive damage award in light of the record evidence. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432

---

[2] The Petition For Certiorari argued that de novo review was necessary to protect Cooper from a verdict that was grossly excessive under the circumstances of this case. See, Pet. for Cert. at 13-14. Cooper's Brief on the Merits makes the far different claim that such review is needed to foster "an environment of predictability and reasonableness." Pet. Brief at 27.

n.10 (1994). Petitioner explicitly rejects this standard as insufficient. Pet. Br. at 26 n.20. Instead, Petitioner urges this Court to recognize a new substantive due process right to limit punitive awards to predictable amounts.

In support, Cooper relies on an research study funded by Exxon Corp., using volunteers as mock jurors. The volunteers were given a variety of fact patterns and asked to determine whether the conduct warranted punitive damages, how they would rank the reprehensibility of the misconduct on a bounded scale, and how much they would assess as punitive damages. The researchers grouped the respondents into "virtual juries" and compared their "verdicts." Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998)

What they found was that the mock juries were highly consistent -- remarkably so, according to the researchers -- in determining liability for punitive damages and the degree of reprehensibility of the misconduct. However, the amounts representing the suggested punitive awards varied widely. *Id.* at 2074.[3]

ATLA submits that there is no basis for the notion that substantive due process guarantees that a defendant be able to predict the amount of punitive damages that might be assessed for misconduct.

---

[3] Empirical studies of real-world jury verdicts suggest that punitive damage award are not arbitrary and that their unpredictability has been overstated. Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells, *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623 (1997).

One salutary result of this Court's attention to punitive damage awards has been to prompt extensive empirical research. Professor Michael Rustad offers a detailed overview of the results of these objective empirical studies, all of which suggest that punitive damages generally are rarely awarded and tend to be modest in amount. Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wis. L. Rev. 15 (1998).

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994), citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L.Ed. 372 (1856)." Traditional practice with respect to punitive damages has historically been characterized by the broad discretion vested in the jury.

The authority of the jury to award damages in tort actions to punish and deter particularly egregious misconduct was first established in *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C.P. 1763), and *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763), in which the Lord Chief Justice Pratt underscored the reluctance of common law courts to interfere with the amount of the jury's award.

This Court's decisions have consistently emphasized the jury's role in fashioning individualized punitive damage awards, not uniformity of outcomes. *See, e.g., Day v. Woodworth*, 13 How. 363, 371, 14 L.Ed. 181 (1852) (assessment of "exemplary, punitive, or vindictive damages . . . has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case"); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("[t]he discretion of the jury in such cases is not controlled by any very definite rules"); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (in "actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict").

In *Haslip*, this Court declared that this traditional common law method for ascertaining the amount of punitive damages does not violate due process. *Haslip* at 17-18.

At the same time, Justice Blackmun wrote for the majority in *Haslip*, the jury's discretion is not unbounded. The verdict in a particular case may be so excessive as to

violate a defendant's due process rights. *Id.* at 18. To describe this constitutional limitation, the Court again looked to traditional practice. Lord Chief Justice Pratt himself stated:

> Upon the whole, I am of opinion the damages are not excessive; and that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

Huckle, 2 Wils. at 207, 95 Eng. Rep. at 769.

In four other decisions prior to 1791, English courts asserted their authority to set aside a jury award that was so high as to indicate that the jury acted out of passion or prejudice or was irrational. *Beardmore v. Carrington,* 19 Howell's State Trials 1405, 1406 (C.P. 1764), 95 Eng. Rep. 790, 793-94 ("Can we say that 1000 pounds are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and pries into all his secret and private affairs . . . ?". . . We cannot say the damages of 1,000 pounds are enormous."); *Fabrigas v. Mostyn*, 2 Black.W. 929, 96 Eng. Rep. 549 (C.P. 1773) (Damages "may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury").

In *Sharpe v. Brice,* 2 Black. W. 942, 96 Eng. Rep. 557 (C. P. 1774), where a customs officer was held liable for trespass, motion for a new trial on grounds that the verdict was excessive was refused because of the circumstances in which the trespass had been committed. However, Chief Justice De Gray stated, "It has never been laid down, that the Court will not grant a new trial for excessive damages in any cases of tort." In *Leith v. Pope*, 2 Black. W. 1327, 1328, 96 Eng. Rep. 777, 778 (C. P. 1779), the jury's verdict for 10,000 pounds for malicious prosecution was upheld because of the outrageousness of the misconduct. The court added, "in cases

of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury."

These decisions make clear that common-law judges in 1791 reserved for themselves the authority to grant a new trial where the punitive damage award was "monstrous" or so flagrantly excessive in view of the evidence before the jury as to indicate some passion or prejudice or wrongdoing on the part of the jury. None evinces any concern that punitive awards be predictable or consistent with other similar cases. Indeed, in *Huckle*, *supra,* a printer who was detained under an illegal general warrant was awarded 300 pounds. John Wilkes, who was detained under the same warrant won 1,000 pounds in *Wilkes v. Wood, supra*. Wilkes later won a verdict of 4,000 pounds in an action against Lord Halifax arising out of the same incident. *Wilkes v. Halifax*, 19 How. St. Tr. 1406 (C.P. 1769).

This Court has indicated that the various formulations of excessiveness courts have traditionally employed are "rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-2792, 61 L. Ed.2d 560 (1979) (whether "no rational trier of fact could have" reached the same verdict). *Oberg* at 432 n.10. At the same time, the Court has rejected the notion that the due process clause imposes a reasonableness standard. *See TXO, supra,* at 458 ("we do not suggest that a defendant has a substantive due process right to a correct determination of the 'reasonableness' of a punitive damages award.")

Petitioner relies heavily on this Court's statement in *BMW* that due process entitles a defendant to notice that not only is conduct subject to punitive damages, but also its amount. Pet. Brief at 11. ATLA submits that BMW cannot be stretched to confer a due process right to limit punitive damages to an objectively predictable level.

BMW was held liable for selling a car as new without disclosing that it had been repainted. No evidence was presented the this conduct was illegal in any state. In fact, BMW had complied with requirements in a large number of states that appeared to offer a safe harbor from liability. Nor had Alabama previously imposed punitive damages in similar circumstances. 517 U.S. at 563-570. It was a fair question whether an out-of-state manufacturer had notice that it might be subject to substantial punitive damages for this conduct.

That type of fundamentally fair notice is a far cry from the objective standard of predictability urged by Petitioner in this case. Cooper's position is more closely analogous to the defendant in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), whose misconduct was not legal or protected in any jurisdiction but was stopped by plaintiff before it caused a large amount of actual damages. Admittedly, Cooper did not have a precise enough figure to determine whether it could proceed with its plans and make a profit despite a liability award. However, has the Court in *TXO* made clear, due process does not require that degree of predictability:

> [Punitive damage] awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make. . . . [W]e are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards."

B. Jury Consideration of Relevant Factors Would Satisfy Due Process Concerns.

Why are awards so erratic and unpredictable that, in Petitioner's view, they violate defendants' substantive due process rights? Petitioner's chief criticism of the present system is that juries do not consider factors that this Court identified in *BMW* as relevant to the reasonableness of awards. Specifically, the jury "neither considered nor should have considered in its deliberations" the degree of reprehensibility of the defendant's misconduct, the ration between the punitive and compensatory award, and the possible criminal or civil penalties for such conduct. Pet. Brief at 8.

ATLA agrees that the BMW factors are relevant to an appropriate assessment of punitive damages. It does not follow, however, that due process demands that they be applied de novo by federal appellate courts. Indeed, there is no federal constitutional right to appellate review at all. *Pennsylvania v. Finley,* 481 U.S. 551, 555-58 (1987); *Abney v. United States,* 431 U.S. 651, 656 (1977). Nor is there any principled reason to limit the benefit of their application to those parties who take their cases to the courts of appeals.

ATLA agrees with Justice O'Connor's observation, that "giving these factors to juries would substantially enhance the fairness and rationality of the state's punitive damages system." *Haslip*, 499 U.S. 1 at 57 (O'Connor, J., dissenting) (referring to factors established by Alabama court).

More importantly, as the Fourth Circuit has held, if such factors are to be considered at all on appeal, the Seventh Amendment *requires* that they be submitted to the jury in the first instance. A federal court "cannot consistent with the Seventh Amendment, evaluate a jury's verdict based on evidence that the jury was not permitted to consider at trial or

on a legal standard not given to the jury." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991).

Petitioner is wrong in its assertion that juries cannot or should not apply the *BMW* factors.

The "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." BMW at 575. This determination is clearly appropriate for the jury, which acts as the conscience of the community in imposing punitive damages for "reprehensible conduct." *IBEW v. Foust*, 442 U.S. 42, 48 (1979). *see also Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting) ("Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community.") (citing Oliver W. Holmes, Collected Legal Papers 237 (1920)).

Petitioner's assertion that juries are not competent to assess the degree of reprehensibility is refuted by the very study petitioner relies so heavily upon. In that study, researchers found that the "jurors" were remarkably consistent their determinations ranking reprehensibility.

> Our first question was whether the degree of outrage is consistent across individuals and across possible juries. A simple way to answer this question is to examine whether rankings of different scenarios are generally similar for different demographic groups. .
> .
>
> The correlations were remarkably high for judgments both of outrage and of punitive intent. In particular, there was essentially perfect agreement among groups in the ranking of cases by punitive intent: the median correlation was .99. Men and

> women, Hispanics, blacks, and whites, and respondents at very different levels of income and education produced almost identical orderings of the twenty-eight scenarios used in the study. Judgments of intent to punish in these personal injury scenarios evidently rest on a bedrock of moral intuitions that are broadly shared in society. We also looked for differences among groups in the average severity of their judgments (in absolute terms, as opposed to their rankings), and here too found no significant differences . . .

Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2097-98 (1998).

The ratio between compensatory and punitive damages, is clearly question of fact that the jury may be instructed to consider. Despite its superficial appearance of precision, however, this numerical ratio is the weakest factor in making punitive damage awards consistent and predictable. The variation in the awards upheld by this Court demonstrate that this factor is easily outweighed by other relevant circumstances. *Compare Haslip*, supra (ratio of four to one upheld) and *TXO, supra* (526 to one ratio upheld).

To the extent that other civil and criminal penalties that may be applicable to defendant's conduct are relevant to the assessment of punitive damages. there is no bar in federal court to a defendant's presentation of such evidence. Some states expressly provide for such evidence by statute or court decision. *See, e.g.*, Ore. Rev. Stat. § 30.925(3)(g) (1991) (in assessing punitive damages in product liability actions, the jury is to consider the "total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."); *Tuttle v. Raymond*, 494 A.2d

1353, 1356 (Me. 1985) (defendant entitled to present factfinder with evidence of any criminal punishment imposed as mitigating factor); *Cheevers v. Clark,* 449 S.E.2d 528 (Ga. App. 1994) (defendant in personal injury suit seeking punitive damages for harm caused by drunk driving was permitted to read to the jury the criminal penalties applicable if he were prosecuted).

Indeed, the Fourth Circuit has properly noted that these item should be given to the jury. *Mattison, supra.. See also,* Charles Jared Knight *State-Law Punitive Damage Schemes And The Seventh Amendment Right To Jury Trial In The Federal Courts*, 14 Rev. of Litig. 657, 698-703 (1995) (endorsing *Mattison*).

If such evidence is relevant in this case , Petitioner can scarcely claim that it was deprived of due process because it chose not to proffer the evidence at trial.

II. THE SEVENTH AMENDMENT BARS APPELLATE RE-EXAMINATION OF PUNITIVE DAMAGE JURY VERDICTS.

Petitioner proposes that, following a jury verdict assessing punitive damages and the district court's denial of a new trial on the basis of excessiveness, the parties would, essentially retry the issue of the amount of punitive damages to the court of appeals. Reviewing the jury's award de novo and applying an evolving set of factors based on the *BMW* guideposts.[4]

Such a re-examination of the jury's findings plainly violates the Seventh Amendment. This court has held that for

[4] Petitioner seeks entry of judgment by the appellate court. Remand for a new trial would be a pointless exercise in that the appellate court would have determined the appropriate amount of punitive damages based on factors not considered by the jury. See Amicus Brief of Product Liability Advisory Council at 8.

an appellate court to enter a judgment for an amount different from that found by the jury plainly violates the Seventh Amendment. A federal court may not, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered, ... enter an absolute judgment for any other sum than that assessed by the jury." *Kennon v. Gilmer,* 131 U.S. 22, 30 (1889). Nor, for the same reason, may the court of appeals order the district court to enter judgment for such an amount. *Hetzel v. Prince William County,* 523 U.S. 208 (1998).

Petitioner asserts, however, that a jury's assessment of punitive damages, unlike its finding on liability or assessment of compensatory damages, is not protected by the Seventh Amendment.

In fact, the origin of the Seventh Amendment is intimately bound up with the jury's power and discretion to award punitive damages.

In 1762 the English Secretary of State Lord Halifax issued a warrant directing the King's messengers to "apprehend and seize, together with their papers," the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45." *See* Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 43 (1937). The ensuing controversy had dramatic impact on both sides of the Atlantic.

The North Briton had published an anonymous article harshly criticizing Prime Minister Grenville's address to Parliament and the administration's policies. The messengers arrested 49 persons, including John Wilkes, a popular member of William Pitt's opposition party in Parliament, who was the author. Many, including Wilkes, brought suit seeking damages for the deprivation of their rights.

The Wilkes affair generated a clutch of decisions, primarily by the Lord Chief Justice Pratt, establishing the

illegality of general warrants and the authority of juries to award exemplary damages to punish and deter such oppression. *See Huckle v. Money,* 2 Wils. 205, 95 Eng.Rep. 768 (C.P.1763); and *Wilkes v. Wood*, Lofft 1, 98 Eng.Rep. 489 (C.P.1763); *Money v. Leach,* 19 How. St. Tr. 1001, 97 Eng. Rep. 1075 (C.P. 1764); *Beardmore v. Carrington,* 19 How. St. Tr. 1405, 95 Eng. Rep. 790 (C.P. 1764); *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765). By the time all the judgments were satisfied, the Crown had paid out an estimated 100,000 pounds. Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 45 (1937).

There can be little doubt that *Wilkes v. Wood* and the other punitive damages cases were a major impetus to the adoption of the Seventh Amendment. The colonists in America closely followed the developments in the Wilkes affair. Indeed, the American press devoted so much attention to his trials, tribulations and speeches that "one may go to almost any issue of any newspaper between 1763-1775 and read of John Wilkes." Clinton Rossiter, Seed-time of the Republic 527 n.158 (1953). Between June 1763 and May 1764 the weekly Boston Gazette, and Country Journal carried 36 separate stories about Wilkes.

The jury verdict in *Wilkes v. Wood* was widely celebrated. One newspaper account proclaimed: "By this important decision, every Englishman has the satisfaction of seeing, that his house is his castle, and is not liable to be searched, nor his papers pried into by the malignant curiosity of King's Messengers, and an utter end put to that unconstitutional practice." Boston Gazette, and Country Journal, Feb. 20, 1764, at 4, col. 1. *See* Eric Schnapper, *Unreasonable Searches And Seizures Of Papers,* 71 Va. L. Rev. 869, 876 (1985). Accounts of the Wilkes cases appeared in newspapers and pamphlets appeared throughout in the colonies several years before the official case reports were published. Thomas Y. Davies, *Recovering The Original Fourth Amendment,* 98

Mich. L. Rev. 547, 564-65 & n.25 and 631 n.222 (1999).

Wilkes v. Wood "was probably the most famous case in late eighteenth century America, period." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994). This Court has recognized that the principles adopted in the Wilkes cases were in the minds of those who drafted the Bill of Rights. *Boyd v. United States,* 116 U.S. 616, 626-27 (1886). It has been suggested that the language of Wilkes v. Wood influenced the text of the Fourth Amendment. Akhil Reed Amar *The Bill Of Rights As A Constitution,*: 100 Yale L.J. 1131 (1991).

The jury's discretionary power to determine the amount of punitive damages cannot be severed from the Seventh Amendment. It was the colonists' desire to preserve that authority which gave impetus to the adoption of the Seventh Amendment, and thus to ratification of the constitution itself. See, Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991).

Most significantly, the drafters of the Seventh Amendment were especially intent on preserving that authority of the civil jury from encroachment by federal appellate judges. Such encroachments were the subject of increasingly bitter complaints by the colonists during the years running up to the American Revolution. Colonial judges did not enjoy the relative independence enjoyed by judges in England after the Glorious Revolution. They were beholden to the Crown and could be expected to favor the King's interests. The American colonists therefore looked to local juries for protection against the autocratic power of British judges. Repeated interference with the colonists' right to jury trial was "one of the important grievances leading to the break with England." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 340 (1979) (Rehnquist, now C.J., dissenting).

Not only did the Crown transfer criminal and civil actions to enforce its oppressive Acts from colonial juries to juryless vice admiralty courts, the colonists also complained against appellate review by the Privy Council in London, which claimed the authority to disallow acts of colonial legislatures and overturn verdicts of colonial juries and judgments of colonial courts. 1 Homer Carey Hockett, The Constitutional History Of The United States 55 (1939) (Council reviewed some 265 colonial cases); Roscoe Pound, The Development Of Constitutional Guarantees Of Liberty 77 (1957). The Council rejected attempts by the colonies to preserve the finality of their own judicial judgments, reviewing some 50 cases on petition after colonial courts had refused to grant leave to appeal. See Hockett, supra, at 55 n.12.

When the Constitutional Convention finished its work, fact that it not only failed to preserve the right to trial by jury in civil cases, but affirmatively conferred on the Supreme Court appellate authority over law and fact, generated widespread demand for a Bill of Rights to preserve the civil jury from encroachment by federal judges. See antifederalists asserted that the constitution effectively abolished the civil jury. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 450-51 (1996) (Scalia, J., dissenting).

The right to trial by jury was plainly designed to prevent the type of re-examination of jury verdicts that Petitioner seeks in this case. The Re-Examination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Justice Story ventured that this provision is "more important" than the preceding portion of the Amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The Re-Examination Clause is a prohibition on "the indirect impairment of the right of trial by jury through judicial re-

examination of factfindings of a jury other than as permitted in 1791." *Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

Petitioner's reliance on a sentence from Justice Scalia's dissent in Gasperini for the proposition that the Seventh Amendment does not apply to jury verdicts for punitive damages is misplaced. Pet. Brief at 29. As Justice Scalia wrote separately in *Tull v. United States*, 481 U.S. 412 (1987), "I can recall no precedent for judgment of civil liability by jury but assessment of amount by the court. Even punitive damages are assessed by the jury when liability is determined in that fashion. 481 U.S. at 228 (Scalia, J., concurring in part and dissenting in part).

The entire Court subsequently clarified Tull, holding that where the Seventh Amendment guarantees the right to a jury trial on liability, it also guarantees a jury determination of damages. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). Erasing any doubt that the Seventh Amendment guarantee includes punitive damages, the Court cited not only *Huckle v. Money* and *Wilkes v. Wood*, but also the early American cases upholding punitive damage awards, *Genay v. Norris*, 1 S.C.L. 6, 7 (1784) and *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791). 523 U.S. at 353.

Well before *Feltner*, the federal courts of appeals had explicitly recognized that the Seventh Amendment protects the right to a jury determination of the amount of punitive damages. *See, e.g., Defender Indus., Inc. v. Northwestern Mut. Life Ins.*, 938 F.2d 502, 507 (4th Cir. 1991) (en banc) (holding that the Seventh Amendment protects the right to a jury determination of punitive damages); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447-48 (10th Cir. 1987) (same); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391-92 (7th Cir. 1984) (same).

Petitioner's assertion that a court may substitute its own determination of the proper amount of punitive damages

for the jury's verdict without violating the Seventh Amendment is wholly without basis.

III. DE NOVO APPELLATE REVIEW TO MAKE PUNITIVE DAMAGE PREDICTABLE IN AMOUNT UNDERMINES THE STATE'S INTEREST IN DETERRING TORTIOUS MISCONDUCT.

Petitioner and supporting amici fail to recognize the distinction between setting aside a jury verdict that is so excessively high that no rational jury could have arrived at such a result, and substituting a more "reasonable" amount for that determined by the jury. Pet. Brief at 10. The former involves setting aside an action by a jury that is so clearly irrational that the jury has not returned a legal verdict at all, and the matter may be submitted to a new trier of fact. The latter situation requires the court to impose its own substantive values to arrive at a "reasonable" verdict. Those substantive values represent policy decisions reserved to the State whose law governs the action. Punitive damages serve the state's interests in punishing and deterring conduct it deems especially unacceptable. Any modification or reversal of the policies the State chooses to advance those interests must be left to the State, not impose by the federal judiciary. As this Court drew this distinction clearly in *Browning Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989):

> Although petitioners and their amici would like us to craft some common law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state law and federal law

> issues. For obvious reasons we decline that invitation.

Id. at 279.

A concrete illustration of this point is the State's interest in deterrence. Many states adopt the classic view that "the lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine." *Tuttle v. Raymond,* 494 A.2d 1353, 1359 (Me. 1985). Companies cannot simply factor the expected cost of punitive damages into the price of goods and services. "If punitive damages are predictably certain, they become just another item in the cost of doing business." *Palmer v. A.H. Robins Co.,* 684 P.2d 187, 218 (Colo. 1984).To review punitive awards with the aim of making them fairly predictable is to undermine the state's interest in deterring conduct which is unlawful but profitable. *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 664, 512 A.2d 466, 477 (1986) (where the amount of damages can be anticipated, "the risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.") "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages." *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989), passing along the cost to the very consumers who are endangered.

Due process surely does not require federal courts to transform punitive damages into, in effect, a user fee.

Some states may take a different view. A state may cap punitive damages, choosing instead to rely on criminal or regulatory enforcement. Another may impose other restrictions designed to be consistent with the Law and Economics theory of "overdeterrence." Yet another may fix punitive awards at a multiple of compensatory damages, representing a policy of providing an incentive for private

enforcement. Cf. *American Society of Mechanical Engineers,* 456 U.S. 556, 575 (1982) (treble damages provide an incentive for litigants to bring private civil suits under the antitrust laws.

One need not agree with the wisdom of any of these policies to recognize that they are state policies. Permitting federal appeals judges to impose their own economic policies on substantive due process grounds "would be Lochnerism on a massive scale." Alan Howard Scheiner, *Judicial Assessment Of Punitive Damages, The Seventh Amendment, And The Politics Of Jury Power,* 91 Colum. L. Rev. 142, 182 (1991).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
Attorney for Amicus Curiae

January 16, 2000